

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment)	NOTICE OF PUBLIC HEARING ON
of ARM 17.38.602 and 17.38.603)	PROPOSED AMENDMENT
pertaining to definitions and)	
enforcement procedures)	(PUBLIC WATER AND SEWAGE
)	SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On July 31, 2003 at 1:00 p.m., the Board of Environmental Review will hold a public hearing in Room 35 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., July 21, 2003, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.38.602 DEFINITIONS Unless the context clearly states otherwise, the following definitions, in addition to those in 75-6-102, MCA, and ARM 17.38.202 apply throughout this subchapter.

(1) through (8) remain the same.

~~(9) "Notice of violation" or "NOV" means a notice that a violation exists and includes an order directing the person to respond.~~

~~(10)~~ (9) "Order" means a written direction issued by the department to a person to take an action or series of actions to comply with a provision of the act or rules implementing the act ~~found at ARM Title 17, chapter 38, subchapters 1 and 2,~~ within a time established under the order and which may include a penalty assessment. ~~It also means any consent order issued pursuant to this subchapter.~~

(11) remains the same, but is renumbered (10).

~~(12)~~ (11) "Warning Violation letter" means a letter notifying sent by the department pursuant to 75-6-110(2), MCA, to notify a persons that they are in violation of the act, rules implementing the act, a condition of approval, or an order of the department, and to describe the actions and a timetable necessary to return to compliance. A violation letter does not constitute a final action by the department and does not create a right to a contested case appeal.

AUTH: 75-6-103, MCA
IMP: 75-6-109, MCA

REASON: The proposed amendments to ARM 17.38.602 are necessary to update and clarify certain definitions. The proposed amendment to delete ARM 17.38.602(9) "notice of violation" or "NOV" is necessary to eliminate confusion with a notice letter, and because a NOV is not a separate administrative enforcement document but is typically part of an order.

The proposed amendment to ARM 17.38.602(10) "order" is necessary to clarify and explain that an order is issued by the department and to delete a redundant portion of the definition that states "an order also means a consent order," since consent order is already defined in ARM 17.38.602(4).

The proposed amendment to ARM 17.38.602(12) is necessary to change "warning letter" to "violation letter" to coincide with existing department terminology. Language is added to the definition to clarify that a violation letter must explain what action is necessary to return to compliance and to clarify that a violation letter does not create a right to an administrative appeal.

17.38.603 ENFORCEMENT PROCEDURES (1) Administrative enforcement under this subchapter encourages progressive enforcement from an initial enforcement response, such as a written or ~~verbal~~ oral communication, through optional follow-up or additional enforcement actions. The initial administrative enforcement action taken will be determined according to the following criteria:

~~(a) A Class I violation may be responded to by the issuance of a notice of violation (NOV) and order for immediate corrective action and may include a penalty. An NOV and order issued pursuant to this subsection, which includes penalties, must be signed by the director or designee.~~

~~(b) Those violations determined by the department to be Class II violations require the issuance of a warning letter prior to the issuance of any NOV and order or consent order under this subchapter. Any NOV and order or consent order issued after failure of the recipient to respond to a warning letter may include administrative penalties.~~

~~(c) Failure to comply with the terms of an order or consent order may be followed by an increased administrative penalty assessment or a judicial action for penalties as provided by law.~~

~~(d) Except for Class I violations, the issuance of a warning letter must precede an imposition of penalties and must identify violations, require appropriate corrective measures within a specified time period, and give notice that the violation may result in the assessment of administrative penalties if:~~

~~(i) there is a failure to take corrective action within the time specified in the letter, or~~

~~(ii) the same or similar violation occurs within 12 months of the date of the warning letter.~~

(a) unless the violation represents an imminent threat to human health, safety, or welfare or to the environment, or is a Class I violation, the department shall first send a violation letter, pursuant to 75-6-110(2), MCA, prior to initiating an administrative enforcement action under this rule;

(b) the department may respond to a Class I violation or a violation that represents an imminent threat to human health, safety, or welfare or to the environment, by issuing an order in lieu of a violation letter;

(c) if a person fails to comply with the compliance requirements or schedule specified in a violation letter, the department may respond by issuing an order.

(2) Orders under this subchapter may include, but are not limited to, the following requirements or conditions:

(a) that the existing public water supply or sewage system be repaired or modified;

(b) and (c) remain the same.

(d) that no additional service connections be made to the public water supply or sewage system;

(e) that the public water supply or sewage system be ~~monitored as required by ARM Title 17, chapter 38, subchapter 2~~ conduct monitoring and reporting;

(f) that a report concerning the condition and operation of the ~~plant, works, system, or~~ public water supply or sewage system ~~required by ARM 17.38.217~~ be submitted to the department;

(g) that ~~project reports, construction documents, and construction report forms~~ maps, design reports, plans and specifications required by ARM 17.38.101 be submitted to the department;

(h) remains the same.

(i) that ~~construction cease and that~~ any commencement or continued construction, alteration, extension or operation ~~further use of the public water supply system, public or sewage system, or improvements to those systems~~ be halted until all written approvals or fees required by statute or rule are obtained;

(j) that activities be conducted to prevent or remove a source of pollution from a place that will cause pollution of a public water supply system or of state water used for domestic purposes; ~~and~~

(k) that public notification be given as specified by rule ~~or order;~~ and

(l) that the public water supply or sewage system retain a certified operator in accordance with Title 37, chapter 42, MCA.

~~(3) Judicial action may be taken for failure to comply with any term or condition of an order issued under this subchapter. The judicial action may be criminal or civil. The provisions of this subchapter do not limit the authority of the department to bring a judicial action, which may include the assessment of penalties and injunctive relief, prior to initiating an administrative action under this subchapter. The judicial action may be criminal or civil.~~

AUTH: 75-6-103, MCA
IMP: 75-6-109, 75-6-110, MCA

REASON: The proposed amendments to ARM 17.38.603 are necessary to explain the department's implementation of 75-6-110(2), MCA, and to simplify administrative enforcement procedures. Section 75-6-110(2), MCA, states that unless the violation represents an imminent threat to human health, safety or welfare or to the environment, the department shall first issue a letter notifying the person of the violation and requiring compliance. The existing rules do not refer to, or clearly implement, this statutory requirement. The existing rules state that in response to a Class I violation, the department may issue an order without sending a notice letter. The existing rules also state that in response to a Class II violation, a warning letter must precede the imposition of penalties.

The proposed amendments delete ARM 17.38.603(1)(a) through (d) and add new language to clarify the enforcement procedures. Proposed amendments to ARM 17.38.603(1)(a) relate to 75-6-110(2), MCA, and state that unless the violation represents an imminent threat to human health, safety or welfare, or to the environment, the department shall first send a violation letter. The Department considers Class I violations, as defined in these rules, as constituting an "imminent threat" for purposes of 75-6-110(2), MCA. As proposed, this amended rule means that a violation letter must be sent for all Class II violations. Proposed amendments to ARM 17.38.603(1)(b) state that the department may respond to a Class I violation or a violation that represents an imminent threat to human health, safety or welfare, or to the environment, by issuing an order in lieu of a violation letter. ARM 17.38.603(1)(c) states that if a person fails to comply with the requirements of a violation letter, the department may issue an order.

Most administrative penalties under the public water supply laws are assessed for violations caused by the failure to monitor. However, the existing rules create barriers to the assessment of penalties for monitoring violations. As currently written, ARM 17.38.603(1)(d)(i) creates an unattainable compliance threshold because monitoring violations cannot be corrected by sampling during a subsequent month. ARM 17.38.603(1)(d)(ii) creates an unnecessary burden by requiring the department to track 12-month compliance periods related to each monthly monitoring violation.

Currently, if a public water supply fails to monitor, the department sends a violation letter to notify the person of the violation and to describe what is required to return to compliance. If the violations continue and exceed the thresholds established by EPA for a significant noncompliance, the department will initiate an administrative enforcement action to seek a penalty and compel compliance. The proposed amendments eliminate the barriers described above and simplify the enforcement rules to facilitate enforcement.

Proposed amendments to ARM 17.38.603(2) are necessary to update terminology and to clarify that public sewage systems are subject to enforcement under the public water supply laws if the public sewage system operates in violation of 75-6-112, MCA. Section 75-6-112, MCA, lists prohibited acts and provides that a person may not commence construction or modify a public water or sewer system without approval, and that a person may not violate a condition or requirement of an approval issued by the department.

ARM 17.38.603 describes the requirements the department may include in an order. Proposed amendments to ARM 17.38.603(2)(d), (e) and (f) add public sewage system to the rules so that the department may order a sewer system to: (d) restrict new connections, (e) conduct monitoring and reporting, and (f) submit a report on the condition and operation of a public water or sewer plant. Proposed amendments to ARM 17.38.603(g) correctly refer to maps, design reports, plans and specifications as required in ARM 17.38.101. Proposed amendments to ARM 17.38.603(2)(i) add public sewage system and coincide with new language in 75-6-112(3), MCA, that was amended by the legislature to include "commence or continue. . . ." The addition of ARM 17.38.603(2)(l) is necessary to clarify that the department may order a public water supply or sewage system to retain a certified operator in accordance with the requirements of the Operator Certification Act, Title 37, chapter 42, MCA.

Proposed amendments to ARM 17.38.603(3) are necessary to clarify that the department may initiate a judicial action, including assessment of penalties and injunctive relief, for failure to comply with the act, rule, order or condition of an approval issued by the department. The authority for this rule is provided in 75-6-110, MCA, which lists the enforcement options available to the department.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., July 31, 2003. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

6. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage

systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us or may be made by completing a request form at any rules hearing held by the Board.

7. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

James M. Madden

JAMES M. MADDEN
Rule Reviewer

By:

Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.,
Chairman

Certified to the Secretary of State June 16, 2003.